

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 21, 2015

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

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A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2014AP811-CR

Cir. Ct. No. 2009CF385

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MICHELLE H. UNDRAITIS,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Columbia County: ALAN J. WHITE, Judge. *Affirmed.*

Before Blanchard, P.J., Lundsten and Higginbotham, JJ.

¶1 PER CURIAM. Melissa Undraitis appeals a judgment of conviction entered after a jury found her guilty of theft in a business setting, contrary to WIS.

STAT. § 943.20(1)(b) (2013-14).¹ Undraitis argues that the circuit court erred when it denied her motion to suppress oral and written statements given to a detective. It is undisputed that these statements were obtained during interrogations and that Undraitis was not read *Miranda*² rights. Therefore, the dispositive issue is whether Undraitis was in custody within the meaning of *Miranda* at the time the detective obtained her oral and written statements.

¶2 After considering the location, duration, and purpose of the interrogations in question, as well as the lack of physical restraint, the presence of a single officer, and the release of Undraitis following the interrogation, we conclude that a reasonable person would have felt at liberty to leave the interrogation. Therefore, under the totality of the circumstances, we conclude that Undraitis was not in custody for purposes of *Miranda* at the time the detective obtained both her oral and written statements. Accordingly, we affirm the circuit court.

BACKGROUND

¶3 Michelle Undraitis worked as a cashier at the Broadway Travel Mart in Wisconsin Dells. Travel Mart management contacted police after suspecting that Undraitis had committed multiple thefts at the store. Detective Jed Seidl arrived at the Travel Mart and interrogated Undraitis in the presence of Travel Mart management. Shortly, thereafter, management exited and Detective Seidl

¹ All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

² *Miranda v. Arizona*, 384 U.S. 436 (1966)

continued with the interrogation. During the course of the interrogation, Undraitis made several inculpatory statements.

¶4 At the conclusion of the interrogation at the Travel Mart, Detective Seidl told Undraitis: “Follow me down to the Police Department, and we’ll get this, the rest of the paperwork end of this done, and then, you can head home or wherever you want to go; okay.” Undraitis left the Travel Mart before the detective and drove herself to the police station, where she later provided the detective with a written confession. Detective Seidl made an audio recording of the Travel Mart interrogation and a partial audio recording of the interrogation at the police station.

¶5 Undraitis moved to suppress both her oral and written statements. She argued, in part, that she was not free to leave during the interrogations at the Travel Mart and the police station; therefore, she was in custody for purposes of *Miranda* and should have been read her rights. In a written decision, the Columbia County Circuit Court denied Undraitis’s suppression motion.

¶6 The case proceeded to a jury trial and the jury convicted Undraitis of theft in a business setting. Following her conviction, she filed a motion for postconviction relief in which she asked for reconsideration of the court’s denial of her suppression motion and a new trial. The circuit court denied her motion for reconsideration and for a new trial.

DISCUSSION

¶7 It is undisputed that Undraitis was interrogated by a police detective and that she was not read her *Miranda* rights. The dispositive issue in this case is whether Undraitis was in custody for purposes of *Miranda* when she gave

incriminating statements, both oral and written, to a detective. For the reasons that follow, we conclude that Undraitis was not in custody when she provided both oral and written statements.

¶8 We review motions to suppress using a two-step process. *State v. Eason*, 2001 WI 98, ¶9, 245 Wis. 2d 206, 629 N.W.2d 625. “First, we review the circuit court’s findings of historical fact, and will uphold them unless they are clearly erroneous.” *Id.* Second, we apply constitutional principles to those facts de novo. *Id.*³

¶9 Undraitis argues that she was in custody and therefore she should have been read her *Miranda* rights before Detective Seidl began interrogating her at the Travel Mart and obtained her oral and written statements. She argues that a reasonable person would not have felt free to terminate the interrogation at either the Travel Mart or at the police station. She alleges that there was a high-pressure environment created by the detective during the interrogation at the Travel Mart and argues that the detective ordered her to drive to the police station. She also asks us to conclude that use of her incriminating statements at trial was not harmless error.

³ Undraitis argues that the circuit court’s reliance on Fourth Amendment case law, rather than Fifth Amendment case law, requires this court to reverse the circuit court’s denial of her motion to suppress. She also asserts that the circuit court erred by not applying the factors discussed in *Howes v. Fields*, 132 S. Ct. 1181, 1189 (2012). We disagree.

First, the circuit court did utilize the correct analytic framework in its decision and order following Undraitis’s motion for reconsideration. Second, under the applicable standard of review, we apply constitutional principles to the facts of this case independently from the circuit court. Therefore, even if we assume that the circuit court’s analysis was flawed or that it failed to consider *Howes*, we would not reverse its decision on that basis alone because we must conduct an independent analysis, which we do here applying Fifth Amendment principles.

¶10 The State contends that the factors used to determine whether an individual is in custody for *Miranda* purposes, such as the location, duration, and lack of restraint indicate that Undraitis was not in custody. Alternatively, the State argues that, if Undraitis’s statements were obtained in violation of *Miranda*, then admission of those statements at her trial was harmless error considering the strength of the other evidence against her. We agree with the State that Undraitis was not in custody at the Travel Mart or at the police station; therefore, we do not address the harmless error argument.

¶11 Both the United States and the Wisconsin Constitutions provide protection against self-incrimination. *State v. Martin*, 2012 WI 96, ¶30 & n.22, 343 Wis. 2d 278, 816 N.W.2d 270 (discussing the Fifth and Fourteenth Amendments to the United States Constitution and Article 1, Section 8 of the Wisconsin Constitution). In *Miranda v. Arizona*, 384 U.S. 436, 439, 444 (1966), the United States Supreme Court relied on the Fifth Amendment to hold that statements obtained by law enforcement during custodial interrogations are not admissible unless law enforcement has informed the individual of his or her right against self-incrimination. In sum, *Miranda* warnings are required when a person is (1) in custody and (2) under interrogation. *State v. Armstrong*, 223 Wis. 2d 331, 352, 588 N.W.2d 606 (1999).

¶12 An individual is in custody for purposes of *Miranda* when he or she “has been taken into custody or otherwise deprived of his [or her] freedom of action in any significant way.” *Miranda*, 384 U.S. at 444. Formal arrest is not required for an individual to be considered “in custody.” See *Armstrong*, 223 Wis. 2d at 353. Instead, whether an individual is in custody to trigger his or her *Miranda* rights requires a determination of whether a reasonable person in the

interrogated individual's position would feel at liberty to leave the interrogation. See *Martin*, 343 Wis. 2d 278, ¶33.

¶13 In applying this objective test, we look to the totality of the circumstances and consider a variety of factors. See *id.*, ¶35. These factors include but are not limited to the location, duration, and purpose of the interrogation, as well as the level of restraint used. *Id.* To evaluate the level of restraint, we look to whether the individual undergoing the interrogation was placed in handcuffs, frisked, or transported to another location. *State v. Torkelson*, 2007 WI App 272, ¶18, 306 Wis. 2d 673, 743 N.W.2d 511. Other factors that may be useful in assessing the level of restraint include the number of officers involved and whether officers utilized a weapon. *Id.* Additional factors, such as the statements made during the interrogation and whether the individual was released following the interrogation, may also be considered. *Howes*, 132 S. Ct. at 1189. The purpose in utilizing these factors is “to determine whether the circumstances present a risk that police may ‘coerce or trick captive suspects into confessing,’ or show that a suspect is subject to ‘compelling pressures generated by the custodial setting itself.’” *Torkelson*, 306 Wis. 2d 673, ¶17 (quoting *Berkemer v. McCarty*, 468 U.S. 420, 433 (1984)).

¶14 We first address the circuit court's findings. We then apply the “in custody” factors to those findings to determine whether Undraitis was in custody when she made oral statements during the interrogation at the Travel Mart. We then turn our attention to the police station where Undraitis gave a written statement.

1. The Circuit Court's Findings

¶15 The circuit court made several findings that support its decision. As to evidence the circuit court did not comment on, we observed that when “a circuit court fails to make a finding that exists in the record, an appellate court can assume that the circuit court determined the fact in a manner that supports the circuit court’s ultimate decision.” *State v. Martwick*, 2000 WI 5, ¶31, 231 Wis. 2d 801, 604 N.W.2d 552. The express findings that support the circuit court decision are as follows.

¶16 In regard to the Travel Mart interrogation, the circuit court found that other employees were present during part of the interrogation, that the detective told Undraitis that she was not under arrest, and that the initial aggressive tenor of the conversation changed quickly. It also found that the interrogation involved a single officer with whom Undraitis was previously acquainted. The court found that the office door was not closed and that the interrogation lasted approximately forty-five minutes. In addition, the court found that the detective did not use restraints and that the interrogation occurred at a location familiar to Undraitis, her workplace.

¶17 As for the interrogation at the police station, the court found that Undraitis “went there voluntarily in her own vehicle and gave the statement freely and voluntarily. She was not in custody.”

2. In Custody at the Travel Mart?

¶18 We now apply the factors summarized above to the undisputed factual findings of the circuit court to determine whether Undraitis was in custody for purposes of *Miranda* while undergoing interrogation at the Travel Mart. The

location, duration, and restraint factors weigh in favor of concluding that Undraitis was not in custody at the Travel Mart. In terms of location, Undraitis was interrogated at her workplace, a familiar environment, in an office where the door remained open. In addition, she was familiar with Detective Seidl, a Travel Mart customer. Also adding to the familiarity of the setting for Undraitis was the fact that members of Travel Mart management were also present at both the beginning and end of the interrogation. In terms of duration, the interrogation lasted forty-five minutes, a relatively short amount of time. Furthermore, with regard to the restraint used, Undraitis was not handcuffed or frisked and the detective told her she was not under arrest. Additionally, Detective Seidl was the only officer involved and he did not draw his weapon.

¶19 We acknowledge that some facts tend to support the conclusion that Undraitis was in custody, such as the detective's accusatory and aggressive tone at the beginning of the interrogation. However, considering the totality of the circumstances, we conclude that a reasonable person would have felt free to terminate the interrogation at the Travel Mart.

3. In Custody at the Police Station?

¶20 Undraitis voluntarily went to the police station immediately after being interrogated at the Travel Mart to provide a written statement and, in Detective Seidl's words, to get "the paperwork end of this done." She argues that the change in location to the police station creates a strong presumption that she was in custody. She also focuses on the language used by the detective, evidenced by the recording of the interrogations, to argue that the detective ordered her to go

to the police station and that he required her to provide a written statement as a condition of her release.⁴ We disagree.

¶21 In *State v. Clappes*, 117 Wis. 2d 277, 287, 344 N.W.2d 141 (1984), the Wisconsin Supreme Court stated, “[p]olice station interrogation carries a strong presumption of custody, although even that can be voluntary on the defendant’s part....” More recently, our supreme court has further explained that “an interview that takes place in a law enforcement facility such as a sheriff’s department, a police station, or a jail, may weigh toward the encounter being custodial, but that fact is not dispositive.” *State v. Lonkoski*, 2013 WI 30, ¶28, 346 Wis. 2d 523, 828 N.W.2d 552. Along with location, we must also consider the other factors discussed above to determine if Undraitis was in custody at the time she provided a written statement at the police station.

¶22 Here, the change in location does not indicate that Undraitis was in custody. This is not a situation in which the interrogated individual was restrained and transported to the police station by law enforcement. Instead, Undraitis voluntarily drove herself to the police station. Indeed, the transcript of the interrogation, which was before the circuit court, indicates that Undraitis left the Travel Mart before the detective, who was briefly delayed when his car failed to start, and that she arrived at the police station before the detective did.

⁴ Undraitis also cites the transcript of the recorded interrogations to argue that she was charged with theft before she provided her written statement. However, assuming without deciding that the detective informed Undraitis that she was being referred for or charged with a crime, we are not persuaded that this would count as a significant factor in causing a reasonable person in her position to believe that she was not at liberty to leave the interrogation.

¶23 Furthermore, we conclude that the detective’s statement to Undraitis about going to the police station would not, on its face, lead a reasonable person to believe that he or she could not end the interrogation. As stated above, the transcript of the interrogation indicates that the detective told Undraitis, “Follow me down to the Police Department, and we’ll get this, the rest of the paperwork end of this done, and then, you can head home or wherever you want to go; okay.” The detective made this statement after Undraitis had already admitted to the thefts at the Travel Mart. This statement would indicate to a reasonable person that the detective requested Undraitis to go to the station to complete paperwork, which is consistent with the voluntary, out of custody statement that she gave. The fact that the detective commented that Undraitis could leave after she accompanied him to the police station does not indicate that she would not be free to go before that time. In addition, as we noted, the circuit court found that Undraitis voluntarily drove herself to the police station. In sum, the detective’s request that Undraitis follow him to the police station would not lead a reasonable person to believe that he or she was prohibited from ending the interrogation.⁵

¶24 Therefore, after considering the totality of the circumstances, we conclude that Undraitis was not in custody for purposes of *Miranda* at the time she provided her written statement at the police station. We conclude that a reasonable person in Undraitis’s position would have felt at liberty to terminate the police station interrogation.

⁵ Undraitis’s argument that the detective conditioned her release on the production of a written statement is also unpersuasive. She directs us to a comment that the detective made to Travel Mart management; however, the transcript of the recorded interrogation indicates that the detective made the comment outside of Undraitis’s presence.

¶25 Because we conclude that Undraitis was not in custody for purposes of *Miranda* when she provided her oral and written statements, we need not address the State's harmless error argument. For the reasons discussed, we affirm the circuit court.

By the Court.—Judgment and order affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5.

